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FOREWORD

When two primeval men laid aside their clubs and agreed to submit their grievances to a third man, who by that gesture became the first judge, humanity took the first step from savagery to civilization.

This led, under our inherited common law system, to the accusative approach to the trial of a lawsuit. One individual accuses another of injury or wrong in a civil case. The accuser, the plaintiff, carries the burden of proof and must satisfy the judge or jury by a preponderance of the evidence of the rightness of his cause. The judge is another individual chosen for the moment, even now in a vast majority of courts not necessarily a lawyer, to umpire the game and give the decision.

This simple procedure, adequate to the needs of a pioneer system, threatens now to be overwhelmed by the multiplicity of disputes inevitable in the complex society of our metropolitan districts.

We hold fast to the right to trial by jury as one of the firm foundations of democracy. That is right. But it is hopeless to apply it to the settlement of all cases involving disputes of a business and commercial nature or of a tort claimed by one against another.

The development of the judiciary in assuming responsibility for this recognized equal branch of government has been continuous. Initiative and leadership in the judges is necessary and proper.

One of the early efforts of the judges in assuming this responsibility was the development by the court itself of what has come to be known as pre-trial practice.

It had its beginnings in the Circuit Court of Wayne County, Michigan, the nisi prius court for the Detroit metropolitan area. Since so many judges and lawyers are presently considering some sort of formal adoption, a brief history of how simply it started may be interesting.

George Brand, Esq., a distinguished member of the Detroit Bar, wrote the story for the American Judicature Society (Volume XXVI, No. 2, August 1942) in which he quoted Judge Frank Day Smith, then a trial attorney, in Volume 9 of the National Lumber Dealer 1929. For personal reasons, we prefer to let them tell the story:

The great expansion of building construction in the Detroit area before the crash of 1929 produced a heavy volume of mechanic's lien litigation in the Circuit Court of Wayne County, Michigan.

Under the state practice the lien of a laborer or materialman was foreclosable only in chancery by bill of complaint making the owner, mortgagors, and all other lien claimants defendants. They could obtain affirmative relief on cross bill. The average suit involved several defendants — generally represented by separate counsel, and, in many instances, there were a dozen or more litigants before the court. Trial of such cases was difficult to procure because of the number of counsel and because of the time necessarily consumed in submitting proofs. Seldom was one lienor informed as to the number of loads of sand or the quantity of bricks, cement, lumber, and so forth, or of the hours of labor, payments, credits, and so forth, of another lienor. Averments of "insufficient knowledge," tantamount to a denial, were usual in the defense pleadings; thus requiring submission of testimony. The result was a particular congestion in lien litigation.

Early in 1926 the judges of the Wayne Circuit Court began to give special attention to the matter of the call and assignment of cases. In May they directed that all mechanic's lien cases be segregated and assigned to Judge Ira W. Jayne; testimony to be taken before a circuit court commissioner whenever possible. What Judge Jayne did in breaking the jam of the lien docket has been graphically related by an article in Volume 9 (1929) of the National Retail Lumber Dealer by Frank Day Smith:

> The Judge simply took down the statute books, brushed away the cobwebs, called in the attorneys of the Detroit Bar. He explained to them his method, and what he thought could be accomplished.
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> The Judge then consulted the Wayne County Bench consisting of fourteen judges and received their approval. He then ordered a lien docket to be published, setting all lien cases for trial as soon as they became at issue, rather than waiting three years for them to come on the regular docket. All cases were set for a certain day, at which time the Judge requested each attorney to state the merits of his claim and his defenses, resulting in a determination at the outset upon the points at issue in each case.
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> The Judge's plan in securing cooperation among attorneys whereby the 'cards were all laid on the table, that is, the contracts, the delivery tickets and other necessary papers were exhibited freely by the attorneys and argued before the Court, as a preliminary procedure, resulted in many cases being settled or otherwise disposed of according to the facts and law

> revealed by the preliminary 'get-together' of attorneys and litigants.
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> Instead of handling one case a day, the Judge would take on from five to ten cases and would dispose of the same satisfactory to all parties.

In 1929 pre-trial was extended to mortgage foreclosure cases, and in 1930 was made compulsory for all chancery cases.

> By this expedient the Judge obtained a "preview" of each case that went upon the docket. The result was the reduction of issues, settlements, limitations of proofs, and early decisions on such issues as required proofs.
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> In 1931 it was made compulsory as to all law cases.
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> In 1932 it was definitely christened "Pre-trial Docket."

Constant experience with the Pre-trial Docket led the court in 1952 to add a discovery procedure and the establishment of a second pre-trial docket called "Pre-trial Admission and Discovery Docket" on which all cases are docketed as soon as they are at issue.

> It gives each side the right to all of the pertinent information in the possession of his opponent and his witnesses from the beginning so that he may have available this information in the preparation of his pleadings and the trial of his case.

This last innovation enables the pre-trial judge to include all the undisputed facts in his pre-trial statement. Of course this eliminates the element of surprise and the last remaining vestiges of trial by verbal combat and really places at the disposition of the court and the attorneys all of the ascertainable undisputed facts before trial. It is remarkable how few disputed facts remain in issue and how many of them are resolved and result in voluntary settlement of the cases before trial or in shortening the trial.

To conclude this history, it may not be out of place to say that this court has reduced the so-called lag between the time of issue and the time of trial from 48 months to less than 10. Meanwhile the population of the County has practically doubled with no increase in number of judges. The use of pre-trial with discovery in all cases has contributed largely to this result.

To pre-trial a case is not easy. It requires initiative, a high degree of skill, hard work, and patience on the part of the pre-trial judge. It requires cooperation, energy, and willingness to explore all the facets of his lawsuit at an early stage in the proceedings on the part of each lawyer. The result, where effectively used, has been to restore to the judiciary a confidence in its ability to keep pace with the quickened tempo of life today and to restore to the profession its place of leadership in social progress.

Ira W. Jayne
Presiding Judge
Wayne County Circuit Court
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